



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MGE/172484

PRELIMINARY RECITALS

Pursuant to a petition filed March 4, 2016, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Wood County Human Services - WI Rapids in regard to Medical Assistance (MA), a hearing was held on April 21, 2016, at Ashland, Wisconsin.

The issue for determination is whether the petitioner can qualify for a retroactive hardship waiver based upon the date of his application rather than the date he requested the waiver if his wife refused to sign his medical assistance application or cooperate with the department.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]

Wood County Human Services - WI Rapids
220 Third Avenue South
Suite 4
Wisconsin Rapids, WI 54495

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Ashland County.
2. The petitioner entered the nursing home on October 8, 2015, and applied for institutional medical assistance on November 30, 2015. The department initially denied the application on December

31, 2015, because his spouse did not sign it. But when he filed a timely appeal, it approved it retroactive to March 7, 2016, the date he filed a request for a hardship waiver.

3. The petitioner's spouse remained in the community. He could not obtain her signature on medical assistance application because she left the state and her family actively prevented her from cooperating with him and the department.
4. The petitioner's financial and medical situation did not change at any point from the date he applied for medical assistance and the date it was approved.
5. The department did not notify the petitioner that he might qualify for a hardship waiver when it initially denied his application.
6. The petitioner and those working with him were diligent in their attempts to obtain his wife's signature on this medical assistance application and her cooperation in determining their assets.

DISCUSSION

The petitioner seeks institutional medical assistance benefits retroactive to November 1, 2015. The procedural background is somewhat fuzzy, but the department initially denied his application in December 2015 because his wife did not sign his application or cooperate in the application process. After he filed a timely appeal, the department found that denying benefits would create an undue hardship and found him eligible retroactive to March 7, 2016, the date he filed an undue hardship request. The department contends that he cannot qualify for retroactive benefits based upon his application date because he did not file the hardship request within 20 days of being notified of his right to do so. He contends that this deadline does not apply to him because the department never notified him of his right to seek the waiver. The department concedes that it never notified him of this right but contends the deadline applies anyway. The parties agree that his appeals are timely and that if the 20-day deadline does not apply to him, his eligibility begins as of November 1, 2015.

A person usually cannot be eligible for institutional medical assistance benefits if his assets exceed \$2,000. Wis. Admin. Code, § DHS 103.06(1)(a); Wis. Stat. § 49.47(4)(b)3g. Because this meager limit can cause a severe hardship for an institutionalized person's spouse, higher limits are allowed for couples where one spouse is in a nursing home and the other remains in the community. *See* Wis. Stat. § 49.455 and 42 U.S.C. § 13964-5. But these "spousal impoverishment provisions" do not allow a couple to keep unlimited assets. Couples whose total assets do not exceed \$100,000 can keep \$50,000, those with between \$100,000 and \$119,220 can keep half of their assets, and those whose assets exceed \$238,440 can keep \$119,220. *Medicaid Eligibility Handbook*, § 18.4.3. This means, for example, that a couple with \$320,000 would have to reduce their assets by over \$200,000 before one of them could receive medical assistance. And they can only reduce the assets by spending them on their own legitimate expenses rather than merely giving them away.

Eventually, sharp elder law attorneys found a way around this limitation. Until 2013, if the couple in the community refused to sign the application and cooperate in the gathering of assets, the medical assistance worker was instructed to base eligibility entirely on the applicant's financial situation. Those in the nursing home transferred all of the assets to spouse still in the community, the community spouse refused to sign the application, the newly destitute nursing home resident was found eligible, and the family assets remained intact.

When the elder law bar finds a loophole, the legislature and the department usually try to plug it. Section 49.455(5)(e) of the Wisconsin Statutes now allows the department to deny benefits if the spouse still in the community refuses to cooperate:

The department may deny to the institutionalized spouse eligibility for Medical Assistance if, when requested by the department, the institutionalized spouse and the community spouse do not provide the total value of their assets and information on income and resources to the extent required under federal Medicaid law or sign the application for Medical Assistance.

The use of the term *may deny* indicates that the department is not required to deny all applications that are not signed by both spouses. This recognizes that sometimes a person who needs medical care legitimately cannot obtain his spouse's signature and cooperation. The department's policy requires it to deny applications where the community spouse refuses to sign or cooperate unless it determines that the denial "would result in undue hardship for the person." *Medicaid Eligibility Handbook*, § 2.5.3. It then instructs its workers to "see Section 17.17 Undue Hardship." *Id.*

Although the department initially denied the petitioner's application, no one still disputes that he and those helping him did everything they could to obtain his wife's signature and cooperation. The background is that he is 86, his wife is 85, and they were over 70 when they got married. Her family obviously does not consider him part of their family. He became ill when the two of them were visiting Florida. She moved in with a child in Oklahoma and later one in Texas, and he returned to Wisconsin. Since then, her family has refused to allow him or any his representatives to speak with her. Her family sent a moving truck to his residence in May 2015 to remove all of her belongings. He was upset and called the police. In October 2015, after repeated falls, he entered the nursing home. He applied for medical assistance at the end of November 2015; he and his wife kept separate accounts, leaving him with no money to pay for his care. After she had become ill earlier that fall, her family removed everything from jointly owned property in Florida and, through a relative who is a realtor, tried to sell it without his participation.

The petitioner's family and representatives spent much of October and November 2015 trying to find his wife and get her to sign his application, provide financial information, and cooperate in selling their jointly owned property. [REDACTED], the Ashland County elderly benefits specialist, contacted both daughters the petitioner's wife had been living with, but neither would let his wife talk to him or cooperate with obtaining her signature on his application. [REDACTED] then mailed the petitioner's application to his wife. Although the post office confirmed that the daughter of the petitioner's wife had received the letter, the application was not returned. When [REDACTED] called to ask about the application, the daughter said that she had retained an attorney who told her not to sign it, but the daughter refused to reveal the attorney's name. [REDACTED] then sent a letter to the daughter requesting the name of the attorney but received nothing back. [REDACTED] stated that she was treated rudely throughout this process.

All of this was enough to eventually convince the department that the petitioner was entitled to benefits without his wife's signature or cooperation. But rather than make him eligible on November 1, 2015, the date everyone agrees he would have been eligible if the department had immediately considered his application as a single person, it found him eligible as of March 7, 2016, the date he submitted his hardship request. The reason for this is its interpretation of *Medicaid Eligibility Handbook*, § 17.17.

That section pertains to hardship waiver requests for those who have been found to have divested assets. A divestment occurs when person gives away his assets for less than fair market value within five years of the latter of when he was institutionalized and when he applied for medical assistance. Wis. Stat. § 49.453(1)(f); *Medicaid Eligibility Handbook*, § 17.5.3. Whenever a divestment occurs, the department must mail out a Divestment Penalty and Undue Hardship Notice (F-10187) that informs the applicant that the divestment period can be waived if the penalty period would endanger his health or life or deprive him of food, clothing, shelter, or other necessities of life. *Medicaid Eligibility Handbook*, §§ 17.17.1 and 17.17.2. There are two potential dates a person seeking a hardship waiver can become eligible. If a valid request is returned within 20 days of when the department notifies the person of his right to seek a

hardship waiver, and the request is approved, the waiver becomes effective on the initial date of the penalty period. If it is not returned within 20 days, and is approved, the waiver does not become effective until the date of the request. *Medicaid Eligibility Handbook*, § 17.17.4.

The petitioner could not return a hardship request within 20 days because the department does not mail them out when an application is denied because it has not been signed. Nevertheless, the department determined that the deadline for an untimely request applies, and it did not approve his benefits until the date of his hardship request.

I understand that it is practical—and generally reasonable—to use procedures that workers are already familiar with to determine eligibility. But the department cannot graft a policy pertaining to one topic of eligibility onto another topic and rigidly enforce that policy when its own failure to comply with the policy makes it impossible for the applicant to comply with it. If the department is going to deny a hardship waiver because its policy states that those requests must be submitted within 20 days, it must also follow that policy and mail out the waivers and instructions to those who may potentially qualify for them. Policy is a set of guidelines, and like any set of guidelines it must be applied in a manner logically consistent with its purpose. The purpose of the policy allowing a hardship waiver in instances similar to the petitioner's is to ensure that those who would be harmed by a denial of medical assistance can receive the benefit despite the absence of a spouse's signature on the application. One of the purposes of the hardship policy as it is written is to ensure that those who act diligently will receive benefits from the first date they are potentially eligible.

The petitioner diligently attempted to obtain his wife's cooperation. In fact, the concerted effort he made to obtain that cooperation despite a wall of opposition from his wife's family contributed to the delay in completing the application process. It is in the department's interest that a person make this type of effort. I find no rational basis for basing eligibility on his failure to comply with a deadline the department never provided to him. Therefore, his benefits should begin on November 1, 2015.

CONCLUSIONS OF LAW

The petitioner's hardship waiver for medical assistance begins on the first day he would have been eligible for the program based upon his own financial situation, application date, and institutional status.

THEREFORE, it is

ORDERED

That this matter is remanded to the county agency with instructions that within 10 days of the date of this decision it take all steps necessary to find the petitioner eligible for institutional medical assistance retroactive to November 1, 2015.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

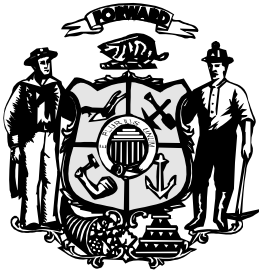
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 19th day of May, 2016

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 19, 2016.

Wood County Human Services - WI Rapids
Division of Health Care Access and Accountability

[REDACTED]

[REDACTED]